UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES M. CAPONE,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	1:06-CV-3014-MHS
AETNA LIFE INSURANCE COMPANY,	:	
Defendant.	:	

ORDER

This action is before the Court on plaintiff's Motion for Award of Attorneys' Fees and Costs. For the following reasons, the Court grants the motion in part and denies it in part.

Background

On or about April 4, 2004, during an employer-sponsored event in the Bahamas, plaintiff James M. Capone was rendered a quadriplegic when he dove off a dock at his hotel, struck his head on the bottom of the ocean, and broke his neck. Capone filed a claim for accident benefits under his employer's Welfare Benefit Plan (the "Plan"). Benefits under the relevant portion of the Plan were funded through an insurance policy and insurance contract with defendant Aetna Life Insurance Company ("Aetna"). Aetna denied Capone's claim initially and on appeal, giving two reasons: first, Capone's injury was the result of his voluntary actions and therefore was not "caused by an accident" within the meaning of the policy; and, second, even if his injuries were deemed to have been caused by an accident, Capone's use of alcohol was a contributing factor, and his loss was therefore subject to a specific policy exclusion.

Following Aetna's denial of his claim, Capone filed the instant action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., seeking to recover the benefits provided for under the Plan. After limited discovery, the parties filed cross-motions for summary judgment. The Court applied the heightened arbitrary and capricious standard of review set out in Williams v. BellSouth Telecomms., Inc., 373 F.3d 1132, 1137-38 (11th Cir. 2004), as modified by subsequent decisions in Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105 (2008), and Doyle v. Liberty Life Assurance Co. of Boston, 542 F.3d 1352, 1359 (11th Cir. 2008). This standard of review required the Court first to determine whether Aetna's denial of benefits was *de novo* wrong, i.e., whether the Court disagreed with Aetna's decision. If not, the denial of benefits would be upheld. If so, then the Court would determine whether, even though wrong, Aetna's decision was reasonable, taking into account Aetna's conflict of interest. If the decision was reasonable, it would be upheld. If, on the other hand, the decision was arbitrary and capricious, it would be reversed.

The Court found that Aetna's decision was not *de novo* wrong; therefore, the Court upheld the denial of benefits. First, the Court held that the insurance policy must be construed in accordance with Georgia law, and that under the "accidental means" doctrine incorporated in Georgia law, plaintiff's injury in this case was not caused by an accident and thus was not covered by the policy. Second, the Court found that the evidence supported Aetna's conclusion that plaintiff's injury was caused or contributed to by the use of alcohol and that the policy therefore excluded coverage.

Plaintiff appealed, and the Eleventh Circuit reversed. Capone v. Aetna Life Ins. Co., 592 F.3d 1189 (11th Cir. 2010). The court of appeals found that Aetna's decision to deny benefits was *de novo* wrong. First, the court agreed that Georgia law applied to plaintiff's claim but held that the "accidental means" doctrine did not bar plaintiff's recovery because plaintiff presented evidence that an external force, such as an unexpected wave, had caused or contributed to the unforeseen result, thus shifting to Aetna the burden to prove that plaintiff was not entitled to benefits. The court held that Aetna failed to carry its burden because it "did not conduct a thorough investigation into the events preceding the injury." Id. at 1199.

Second, with regard to the alcohol exclusion, while the court of appeals agreed that it was reasonable to conclude that Capone was under the influence of alcohol at the time of the accident, the court found that it was "unreasonable to conclude that his intoxication caused his injury." Id. at 1200. The court held that Capone had carried his burden of proving a *prima facie* case of entitlement to benefits by showing that several other individuals were diving from the dock at the same time as he did, and that they dove irrespective of their consumption of alcohol. Id. The burden then shifted to Aetna to prove that Capone was not entitled to benefits because of the alcohol exclusion. Once again, the court of appeals held that Aetna failed to carry this burden because it failed to conduct a reasonable investigation. Id.

Having concluded that Aetna's decision denying benefits was *de novo* wrong, the court of appeals remanded the case to this Court "for further consideration." Id. at 1201. Following remand, Capone moved for entry of judgment in his favor. The Court granted plaintiff's motion because the Eleventh Circuit's decision precluded a finding that there were reasonable grounds supporting Aetna's decision to deny benefits. Order of June 14, 2010, at 9-10. The Court directed entry of judgment in favor of plaintiff for $535,000, the face amount of the benefit payable to plaintiff under the policy, plus interest at 18% per annum from December 2, 2005, which was fifteen days after plaintiff had submitted all information requested by Aetna before its denial of plaintiff's claim for benefits. Id. at 10-11. Aetna subsequently satisfied the judgment by paying plaintiff $535,000 in benefits and $440,341.64 in interest. Aetna also paid plaintiff $3,648.23 in taxable costs.

Plaintiff now moves for a discretionary award of attorneys' fees and costs. Plaintiff was represented by two attorneys, Marc Ginsberg and Randall Grayson, each of whom has submitted separate claims for fees and expenses. Mr. Ginsberg claims fees of $190,100, representing 380.2 hours at a rate of $500 per hour, plus $1,687.21 in travel costs related to depositions and attendance at oral argument before the Eleventh Circuit. Mr. Grayson claims $239,225 in fees, representing 478.45 hours at $500 per hour, plus $1,718.23 in various administrative costs such as filing fees, service fees, courier fees, postage, and copying costs. Thus, plaintiff seeks a total fee award of $429,325, plus costs in the amount of $3,405.22.

Discussion

I. Entitlement to Award

In an action under ERISA "by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). Under this provision, the Court has broad discretion to award fees and costs "as long as the fee claimant has achieved 'some degree of success on the merits.'" Hardt v. Reliance Standard Life Ins. Co., 130 S. Ct. 2149, 2152 (2010)(quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 694 (1983)). Once that requirement is satisfied, the Court may consider a five-factor test developed prior to Hardt in determining whether an award of fees and costs is appropriate. Id. at 2158 n.8. Those factors are

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions.

Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980)(footnote and citations omitted).

Plaintiff in this case recovered the full amount of the benefit he was seeking, plus interest. Therefore, he has clearly satisfied the requirement of achieving "some degree of success on the merits." Moreover, each of the relevant factors outlined above supports an award of fees and costs in this case. Accordingly, the Court concludes that plaintiff is entitled to recover his reasonable attorneys' fees and costs.

First, the Eleventh Circuit's opinion attributed a significant degree of culpability to Aetna. The court repeatedly criticized Aetna for its failure to conduct a reasonable investigation. Specifically, with respect to Aetna's contention that plaintiff's injury was foreseeable, the court found that

> Aetna did not conduct a thorough investigation into the events preceding the injury. Aetna failed to investigate the depth of the water at low tide, the depth of the water at high tide and the tidal conditions at the time of the accident. Aetna made no attempt to locate other guests who might have been on scene, which could have been done through hotel records. Capone showed that Aetna's estimate of the dock's height was clearly erroneous, yet the record does not reflect any additional action taken by Aetna to review their decision. Certainly an injury of this magnitude demands a full and complete investigation.

Capone, 592 F.3d at 1199. Likewise, with respect to Aetna's contention that plaintiff's injury was caused or contributed to by his use of alcohol, the court found that

> Aetna did not conduct a reasonable investigation sufficient to show that Capone is not entitled to benefits. There was no investigation regarding the series of events leading up to the dive or the intoxication level of the other divers. There may have been some who had consumed no alcohol, yet still chose to dive. Again, this investigation could have been conducted by contacting other guests engaged in this same activity.

Id. at 1200. The court found that Aetna's failure to fully investigate plaintiff's claim before denying benefits was a breach of its responsibilities as a fiduciary. Id. at 1199-1200. The Court concludes that this factor supports an award of fees and costs.

Second, Aetna does not dispute that it has the ability to satisfy an award of fees and costs. In addition, it is relevant to note that plaintiff is a permanently disabled quadriplegic who would be unable to compensate his attorneys except out of his recovery of benefits if an award of fees and costs were not made. Therefore, this factor also supports an award of fees and costs.

Third, an award of fees and costs in this case will have deterrent value because it will encourage other fiduciaries to perform full and complete investigations before denying a claim. Although every claim is fact-specific, the need for a thorough investigation of the facts is common to all claims.

The fourth factor is whether the party seeking fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself. Although plaintiff did not bring this action to benefit all participants in the Plan, the Court finds that this consideration also supports an award of fees and costs. Plaintiff's action resulted in a published Eleventh Circuit opinion that, as Aetna itself acknowledges, "appl[ied] a more stringent duty to investigate than had previously been articulated." Aetna's Br. in Opp'n at 9. Thus, plaintiff's efforts established new legal precedent that clarifies the burden of investigation placed on ERISA fiduciaries and benefits all ERISA claimants.

Finally, the relative merits of the parties' positions are starkly revealed in the Eleventh Circuit's opinion. Plaintiff prevailed on both of the central issues in the case: whether his injury was caused by an accident, and whether the alcohol exclusion applied. As to the first issue, the court held that plaintiff had established a prima facie case of entitlement to benefits by showing that his injury was most likely the result of "some unforeseen or unintended condition or combination of circumstances . . . ." 592 F.3d at 1199. As for the alcohol exclusion, the court held that plaintiff had carried his burden by showing that "other individuals were diving from the dock . . . . irrespective of their consumption of alcohol . . . ." Id. at 1200. Due to its failure to conduct a full and complete investigation, Aetna failed to offer evidence sufficient to rebut either showing. Therefore, this consideration also supports an award of fees and costs.

II. Amount of Award

The starting point for calculating reasonable attorneys' fees is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" for the attorneys' services. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Blum v. Stenson, 465 U.S. 886, 888 (1984). The product of these two numbers is commonly referred to as the "lodestar." Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 563 (1986). After calculating the lodestar, the court may adjust the amount upwards or downwards based on a number of factors, such as the quality of the results obtained and the legal representation provided. Blum, 465 U.S. at 897; Duckworth v. Whisenant, 97 F.3d 1393, 1396 (11th Cir. 1996). In accordance with this methodology, the Court will first determine the number of hours reasonably expended by plaintiffs' counsel on this litigation and then the hourly rates at which such work should reasonably be compensated. Since no adjustment to the lodestar is sought in this case, the product of these numbers will be plaintiff's reasonable attorneys' fees.

A. Reasonable Hours Expended

In determining a reasonable number of hours, the Court must exclude hours that were not "reasonably expended." Hensley, 461 U.S. at 434. "Work performed by multiple attorneys, however, is not subject to reduction where the attorneys were not unreasonably doing the same work." Webster GreenThumb Co. v. Fulton County, 112 F. Supp. 2d 1339, 1350 (N.D. Ga. 2000)(citations omitted). "Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." Hensley, 461 U.S. at 434. If counsel fails to do so, the Court must do it for them. ACLU v. Barnes, 168 F.3d 423, 428 (11th Cir. 1999).

Mr. Ginsberg and Mr. Grayson have each submitted their own affidavits and supporting time records setting out in detail the number of hours expended on this case and attesting that the hours expended were reasonably necessary to prosecute the case.[1] In addition, they have submitted the affidavits of Heather Karrh and Paul M. Sullivan Jr., both experienced

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[1] Both attorneys voluntarily reduced their recorded time to eliminate time spent on administrative matters, Mr. Ginsberg by approximately 30 hours and Mr. Grayson by approximately 60 hours. Ginsberg Aff. ¶ 5; Grayson Aff. ¶ 43.

ERISA practitioners, who attest that the hours expended by Mr. Ginsberg and Mr. Grayson were reasonably necessary to prosecute this case.

Aetna objects to the hours claimed by plaintiff's counsel on a number of different grounds. The Court addresses each objection in turn below.

1. Aetna contends that 31.9 hours of Mr. Ginsberg's time spent on pre-litigation administrative proceedings is not compensable and should be excluded. The Court agrees. See Kahane v. UNUM Life Ins. Co. of Am., 563 F.3d 1210, 1215 (11th Cir. 2009)(holding that ERISA "does not authorize awards for work done in pre-litigation administrative proceedings").[2]

2. Aetna contends that plaintiff may not recover for 15.6 hours of Mr. Ginsberg's time and 13.4 hours of Mr. Grayson's time expended on claims and parties that were dismissed. Once again, the Court agrees. See Norman v. Housing Auth. of the City of Montgomery, 836 F.2d 1292, 1302 (11th Cir.

[2] The affidavit of attorney Paul M. Sullivan Jr. submitted in support of Mr. Ginsberg's claim acknowledges that 27.7 hours should be excluded for this reason. Mr. Ginsberg's time records reflect an additional 4.2 hours in this category, resulting in a total of 31.9 hours that should be excluded.

1988)("[I]n determining reasonable hours the district court must deduct time spent on discrete and unsuccessful claims.").

3. Aetna contends that plaintiff's attorneys should not be compensated for 51.2 hours spent litigating the standard of review and arguing that the accidental means doctrine did not apply, because plaintiff lost on these issues at the district court level and the Eleventh Circuit affirmed this Court's rulings on both issues . The Court rejects this argument and finds that the time spent by plaintiff's counsel on these issues is fully compensable.

As to the standard of review, the parties agreed to have the Court rule on this issue in order to determine the scope of discovery. Even though plaintiff did not prevail on his contention that the appropriate standard of review was *de novo,* the Court ruled in plaintiff's favor on the scope of discovery. Order of February 5, 2008, at 14. Furthermore, contrary to Aetna's contention, the court of appeals did not affirm this Court's ruling on the standard of review. Instead, the court found it unnecessary to reach the issue. 592 F.3d at 1196.

As to the applicability of the accidental means doctrine, although plaintiff lost on that issue in this Court, the court of appeals did not affirm that ruling. To the contrary, the court of appeals expressed "serious doubt" as to whether certain policy language mandated application of the accidental means standard. 592 F.3d at 1198. Ultimately, however, the court found it unnecessary to decide this issue, because it concluded that plaintiff qualified for coverage even if the accidental means doctrine did apply. Id. at 1198-99.

4. Aetna objects to being required to compensate plaintiff's attorneys for time spent in connection with obtaining Aetna's consent to extensions of time and expansions of page limits. The Court agrees that plaintiff should not recover fees incurred in connection with the extension of such professional courtesies by Aetna's counsel. Therefore, the 6.3 hours of Mr. Grayson's time identified by Aetna in this category will be excluded.[3]

[3] Some of these time entries also include work on substantive matters, but since it is impossible to tell how much of the time was spent on the substantive matters and how much on obtaining Aetna's consent, all of the time will be excluded.

5. Aetna contends that the number of hours claimed should be reduced because plaintiff's attorneys engaged in extensive block billing. Block billing "consists of attorneys recording large blocks of time for tasks without separating the tasks into individual blocks or elaborating on the amount of time each task took." Flying J Inc. v. Comdata Network, Inc., 322 Fed. App'x 610, 617 (10th Cir. 2009). The Court has reviewed the examples of block billing cited by Aetna and finds that they do not justify a reduction in the hours claimed. Most of the cited block entries are for relatively short time periods. Even where substantial blocks of time are involved, the individual tasks described are such that the Court can evaluate whether the total time claimed is reasonable.

6. Aetna contends that plaintiff's two attorneys spent "countless" hours discussing the case with one another by telephone and email, researching the same issues, and reviewing the same pleadings, and that these redundant hours should be reduced. Aetna, however, fails to specify the number of hours that it claims are redundant, or even to cite examples of such redundancies in the billing records. It is not improper for two attorneys to collaborate on the same case, and such collaboration necessarily entails some

reasonable amount of time communicating with each other about the case and reviewing the same documents. After reviewing the time records, the Court finds that the hours spent by Mr. Ginsberg and Mr. Grayson on such tasks were not excessive.

7. Aetna contends that the attorneys spent an excessive amount of time on certain tasks and cites specific examples. After reviewing the examples cited, the Court agrees that some of the hours claimed are excessive and should be reduced as follows:

a. Mr. Ginsberg's recorded 3.8 hours on 3/18/07 to review Aetna's reply brief in support of its motion to dismiss is reduced to 1 hour.

b. Mr. Ginsberg's recorded 2.2 hours on 3/22/07 to review the final draft of plaintiff's reply brief in support of motion to file second amended complaint is reduced to .5 hour.

c. Mr. Grayson's recorded 2.8 hours on 3/22/07 to draft, edit and revise reply brief, etc., is reduced to 1 hour.

d. Mr. Ginsberg's recorded 2.9 hours on 4/10/07 to review Aetna's motion to file surreply and discuss with Mr. Grayson is reduced to 1 hour.

e. Mr. Ginsberg's recorded 1.2 hours on 5/7/07 to review scheduling order, calendar dates, and make notes regarding discovery is reduced to .5 hour.

f. Mr. Ginsberg's recorded 7.3 hours on 8/11-12/08 to review Aetna's response to plaintiff's motion for summary judgment is reduced to 3 hours.

g. Mr. Grayson's recorded 11.8 hours on 8/11-13/08 to review Aetna's response brief, etc., is reduced to 6 hours.

h. Mr. Ginsberg's recorded 3.4 hours on 12/19/08 to review Order granting Aetna's motion for summary judgment and discuss with Mr. Grayson is reduced to .5 hour.

i. Mr. Ginsberg's recorded 21.9 hours on 11/17-20/09 to prepare for and attend Eleventh Circuit oral argument is reduced to 10 hours.

Reduced as set out above, Mr. Ginsberg's hours total 306.5 and Mr. Grayson's hours total 451.15.[4] Based on the evidence submitted, the Court finds that these hours were reasonably expended by plaintiff's counsel on this litigation.

B. Reasonable Hourly Rate

The next step in the lodestar calculation is the determination of "a reasonable hourly rate" for the attorneys' services. Hensley, 461 U.S. at 433. A reasonable hourly rate is "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Barnes, 168 F.3d at 436 (quoting Norman, 836 F.2d at 1299). The applicant attorney's customary billing rate for fee-paying clients ordinarily is the best evidence of his market rate, although that information is not necessarily conclusive. Dillard v. City of Greensboro, 213 F.3d 1347, 1354-55 (11th Cir. 2000). A fee applicant may also provide opinion evidence of reasonable rates, which is usually done by submitting affidavits of other attorneys in the relevant legal community. Duckworth, 97 F.3d at

[4] This represents approximately a 20% reduction in Mr. Ginsberg's hours and a 5% reduction in Mr. Grayson's hours.

1396-97. Finally, the Court may use its own personal experience and expertise to assess the lawyering skills exhibited in the case. Id. at 1397.

Both Mr. Ginsberg and Mr. Grayson seek compensation at the rate of $500 per hour. In addition to their own affidavits, they rely on the affidavits of Paul M. Sullivan Jr., Heather Karrh, and Paulette Adams-Bradham, all experienced ERISA practitioners, who attest that based on their experience, skill, and reputation, a $500 hourly rate for both Mr. Ginsberg and Mr. Grayson is fair and reasonable and consistent with the prevailing market rates in the Northern District of Georgia, the Eleventh Circuit, and nationally.

Aetna contends that a $500 per hour rate "is unreasonable and should be reduced significantly," but does not specify what it believes would be a reasonable rate. Br. in Opp'n at 24. Aetna points out that the attorneys who have submitted affidavits in support of the $500 per hour rate have themselves, in past cases, charged significantly lower rates, ranging from $200 to $300 per hour. Aetna also objects to the admissibility of a chart from the Fulton County *Daily Report* attached to Ms. Adams-Bradham's affidavit, which purportedly shows rates charged by various ERISA attorneys in the Eleventh Circuit.

After reviewing all the evidence and applying its own knowledge of prevailing rates in the Atlanta market, the Court finds that a rate of $500 per hour is excessive. First, the testimony of plaintiff's affiants must be discounted to some degree because they attest only to what they believe is a reasonable rate, rather than to the rates actually billed and paid in similar lawsuits. See Norman, 836 F.2d at 1299 ("[S]atisfactory evidence of [hourly rates] necessarily must speak to rates actually billed and paid in similar lawsuits"). The affiants' testimony is also undermined by the fact that they themselves apparently charge a significantly lower rate.

Second, even assuming it is admissible, the *Daily Report* chart is not persuasive evidence of the prevailing market rate in the Atlanta market. The chart includes only a relative handful of practitioners, most of whom do not practice in Atlanta.[5] Furthermore, the chart is heavily skewed toward large firm practitioners, who typically bill at the high end of the market.

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[5] The chart lists 20 practitioners, only 7 of whom are based in Atlanta.

Based on all these considerations, the Court finds that a rate of $425 per hour fairly and reasonably represents the prevailing market rate in the Atlanta market for similar legal services provided by attorneys with skills, experience, and reputations comparable to Mr. Ginsberg and Mr. Grayson. Based on this rate, Mr. Ginsberg is entitled to a fee of $130,262.50 (306.5 hours x $425 per hour) and Mr. Grayson is entitled to a fee of $191,738.75 (451.15 hours x $425 per hour) for a total fee award to plaintiff of $322,001.25.

C. Costs

Most district courts within this circuit hold that the costs available under 29 U.S.C. § 1132(g)(2) are limited to the taxable costs recoverable pursuant to 28 U.S.C. § 1920. See, e.g., Iron Workers Local 597 Pension Fund v. Champion Steel of Central Fla. Corp., No. 6:08-cv-905-Orl-31KRS, 2009 WL 1159962, *6 (M.D. Fla. Apr. 29, 2009); but see Cromer-Tyler v. Teitel, No. 1:01-cv-1077-MEF-SRW, 2007 WL 2684878 (M.D. Ala. Sept. 11, 2007). Plaintiff in this case has already recovered all of his taxable costs. He has presented no argument as to why any additional costs should be allowed. The Court concludes that no additional costs are recoverable.

Summary

For the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART plaintiff's motion for award of attorneys' fees and costs [#104] and ORDERS defendant to pay plaintiff attorneys' fees in the total amount of $322,001.25. The Court DIRECTS the Clerk to enter judgment accordingly.

IT IS SO ORDERED, this 21 day of December, 2010.

Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia